APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354—Civil

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Decided .....

Before MARTIN, Circuit Judge; DARR and SHELBOURNE, District Judges.

PER CURIAM. The undersigned three-judge court was assembled pursuant to sections 2284 and 2321-2325, Title 18, United States Code, for the hearing of an application for interlocutory injunction. The court has considered the pleadings and the proceedings and evidence adduced before the Interstate Commerce Commission, the entire record in the case, and the oral arguments and briefs of the attorneys for the plaintiff, for the defendants, and for all the interveners, constituting all the parties. It was agreed that the hearing would be a final hearing on the merits upon demand for a permanent injunction.

The court is of opinion that the litigation will be most expeditiously and, at the same time, adequately disposed of finally by the promulgation of findings of fact and conclusions of law, instead of by a lengthy opinion. Accordingly, the following findings of fact and conclusions of law are filed for entry.

FINDINGS OF FACT

1. The Louisville and Nashville Railroad Company, The Nashville, Chattanooga & St. Louis Railway, the Atlantic Coast Line Railroad Company, and The Atlantic Coast

Line Company, hereinafter sometimes referred to collectively as the applicants, and individually as the Kentucky Company, the Tennessee Company, the Coast Line, and the Connecticut Company, respectively, or by the distinctive name in their respective corporate titles, on January 28, 1955, jointly applied for authority under Section 5(2) of the Interstate Commerce Act, as amended, to merge the properties and franchises of the Tennessee Company into the Kentucky Company for ownership, management, and operation. The Connecticut Company and the Coast Line joined in the application because of their control, through stock ownership, of the Kentucky Company.

2. The plaintiff, City of Nashville, and the intervening plaintiffs, State of Tennessee, Tennessee Public Service Commission, Davidson County, Tennessee, and the NC & StL Railway Employees Job Protection Association, intervened before the Interstate Commerce Commission in opposition to the merger. Hearings were held at Washington, D. C., on August 23 to August 26, 1955, and at Nashville, Tennessee, on August 30 to September 1, 1955. Upon petition of the City of Nashville, et al., the Commission, by Division 4, ordered a further hearing at Washington on September 13, 1955, for the purpose of adducing testimony with respect to a routing and solicitation agreement between the Kentucky Company and the Tennessee Company which the Examiner previously had refused to require the applicants to furnish for the record. The Examiner filed a proposed report, recommending the merger on or about June 21, 1956. Exceptions were filed by the plaintiffs and intervening plaintiffs; oral argument before the full Commission was scheduled and held; and, on March 13, 1957, the Commission released a report and order, both dated March 1, 1957, approving the merger. The order was made effective forty days from date, to-wit, on April 9, 1957. The complaint in this case, seeking to set aside and vacate the order of the Commission, was filed March 29, 1957, and a temporary restraining order was issued on April 8, 1957.

3. The application stated that the Connecticut Company has outstanding 235,200 shares of common stock, each share having one vote, and that there were 973 stockholders as of November 13, 1953. The application stated further that, as of November 15, 1954, Mercantile Safe Deposit & Trust Company, 13 South Street, Baltimore 2, Maryland, owned 86,313 shares, and Safe & Company, 13 South Street, Baltimore 2, Maryland, owned 42,636 shares. Safe & Company is a nominee for Mercantile-Safe Deposit & Trust Company. At the hearing before this court, plaintiff filed as an exhibit "Supplemental Application of Mercantile-Safe Deposit & Trust Company and Motion to Dismiss said Supplemental Application" filed July 6, 1956, with the Interstate Commerce Commission in Finance Docket No. 19261, involving application of Atlantic Coast Line Railroad Company and the Atlantic Coast Line Company, under Section 5(2) of the Interstate Commerce Act, for authority to purchase the properties of the Florida East Coast Railway Company. This supplemental application, verified by Thomas B. Butler, President, who is also a director of the Kentucky Company, states that the Mercantile-Safe Deposit & Trust Company, as sole Trustee under various trusts, holds a majority of the voting stock of the Connecticut Company and also holds additional amounts in other fiduciary capacities, and 4,725 shares outright. Mercantile-Safe Deposit & Trust Company did not join in the application in the proceeding here involved.

4. The plaintiff, City of Nashville, brought this suit to annul, vacate and set aside the report and order of March 1, 1957, of the Interstate Commerce Commission in Louisville and Nashville Railroad Company, Et Al., Merger, Etc., authorizing, under Section 5(2) of Title 49, United States Code, the merger of The Nashville, Chattanooga & St. Louis Railway into the Louisville and Nashville Railroad Company and the acquisition of direct control by the Atlantic Coast Line Railroad Company of the surviving

corporation and indirect control of such corporation by The Atlantic Coast Line Company, holding company. The Commission's order was released on March 13, 1957.

The report and order of March 1, 1957 also authorize, under Section 20a of Title 49, United States Code, the issuance by applicant, Louisville and Nashville Railroad Company, of additional shares of stock and the assumption by the Louisville and Nashville Railroad Company of obligation and liability in respect of the securities of The Nashville, Chattanooga & St. Louis Railway.

5. Intervenors, as plaintiffs, are the State of Tennessee, the Tennessee Public Service Commission, the County of Davidson, Tennessee, Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representative of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, and the NC&StL Railway Employees Job Protection Association. Interveners, as defendants, are the Louisville and Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway. These interventions are authorized by section 2323, Title 28, United States Code.

6. On April 8, 1957, a temporary restraining order was issued by John D. Martin, United States Circuit Judge sitting by designation as District Judge of the United States District Court for the Middle District of Tennessee, Nashville Division, staying the operation of the Commission's order. Such temporary restraining order was issued pursuant to Section 2284 of Title 28, United States Code, to remain in effect until the hearing and determination of the issues by this court.

7. In its report and order, the Commission found that, subject to certain prescribed conditions and to terms and conditions which it found to be just and reasonable, the proposed merger is within the scope of sub-paragraph (a)

of Section 5(2) of Title 49, United States Code, and that it will be consistent with the public interest.

8. The Commission found that the stockholders of both involved companies had voted for the merger. In both companies there was more than a majority of the shares entitled to vote cast for the merger. The only state law which could alter the majority vote requirement of Section 5(11) of Title 49, United States Code, is Section 2610 of Williams' Tennessee Code (Section 65-601 of Tennessee Code Annotated), which requires of Tennessee corporations (The Nashville, Chattanooga & St. Louis Railway being such a corporation) a vote of "three-fourths in amount of the total stock of said company present and voting." This requirement was not in the vote cast for the merger by stockholders of The Nashville, Chattanooga & St. Louis Railway.

9. A comprehensive record was made before the Commission, which held three separate hearings. The transcript of testimony covers 1,733 pages. There were numerous and elaborate exhibits. Extensive briefs, exceptions to the Examiner's proposed report and replies to such exceptions were submitted to the Commission, numerous other documents were filed, and the parties were heard on oral argument by ten members of the Commission, one member not participating. The decision of the Commission was unanimous.

10. The Commission concluded that "the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilities" of the involved companies; that savings approximating $3,243,123 per annum—and probably more—may be expected from the merger; that such "savings and improved efficiency of operation necessarily would strengthen the applicants, and render them capable of better service"; that "Applicants have spent vast sums of money in improvements to their

equipment and plant"; that additional large improvements are in contemplation, but that "Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger"; and that "anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad."

11. The Commission found that the Louisville and Nashville Railroad Company owns 74.9% of the capital stock of The Nashville, Chattanooga & St. Louis Railway; that the former company acquired control of the latter company in January, 1880; "that these two railroads have been closely coordinated in service, operation, and managerial relations for more than 75 years, and that the policy of such operation has been harmonious in the interest of both carriers during that long period of time"; and that in such circumstances "it cannot be said that an antagonistic competitive situation has existed between them." The Commission held that there would be a reduction in competition to the extent that competition between the two railroads exists. It found, however, "that the reduction in competition resulting from the merger would be consistent with the public interest."

12. The Interstate Commerce Commission recognized that the economy of the City of Nashville would be adversely affected through loss of employment and loss of a railroad headquarters, and that while shippers will have a certain election of routes, service via such routes will be by the Louisville and Nashville Railroad instead of by the Louisville and Nashville or the Nashville, Chattanooga & St. Louis Railway. The Commission stated, however, that "even approaching this problem from the standpoint that the applicants are truly competitive, it is our view and we find that for the reasons herein set forth the advantages to the public interest from the merger outweigh the disadvantage to the single locality of Nashville."

13. Nashville, a large and important Southern city, Capital of Tennessee, is today served by both the Kentucky and Tennessee Companies and by the Tennessee Central. The Tennessee Central is a small railroad with termini at Hopkinsville, Kentucky, and Harriman, Tennessee. In comparison, Nashville's surrounding neighboring cities have materially more trunk line rail service. Louisville, Birmingham and Memphis are reached by eight trunk lines each; Atlanta, seven; Evansville, five; Chattanooga, four; and Knoxville, two. With the elimination of the Nashville, Chattanooga & St. Louis Railway, Nashville would be served by only one trunk line railroad and would lose the benefit of such competition as now exists between the Louisville and Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway in solicitation and service. Nashville's economy would be adversely affected by the removal of the headquarters of the Tennessee Company and by the elimination or removal of numerous employees of the Tennessee Company who now reside in Nashville and its environs. Many of these employees have been with the company for many years; and, while under the terms of the merger any loss of earnings for four years will be made up, some of them would be required to sell their homes in Nashville and move elsewhere with their families, others would be under the necessity of obtaining other employment with all the disadvantages incident to changing jobs late in life.

The Commission found that a major portion of the savings expected to be accomplished by the merger will be from the displacement of employees.

14. The order of the Interstate Commerce Commission expressly provides that the merger is approved and authorized upon conditions: among others, that it is "subject to the conditions for the protection of railway employees." In its report, the Commission stated its conviction that

any disputes as to particular employees or group of employees affected by the actions of the applicants in consummating the merger may be resolved by following the procedure set forth in Condition # 8, as prescribed in *Oklahoma Railway Co., Trustee Abandonment*, 257 I. C. C. 177 (see especially pages 192, 196, and the discussion entitled "Conclusions" at pages 196 to 202), incorporated in the New Orleans passenger terminal conditions previously prescribed. Such condition provides for consideration and determination by an arbitration committee of questions regarding the eligibility for protection of persons or groups elsewhere described in the conditions.

15: Toward the conclusion of a lengthy colloquy concerning the protection of rights of the Nashville, Chattanooga & St. Louis Railway employees, counsel for the Interstate Commerce Commission, Robert W. Ginnane, Esquire, made the statement that the Commission is without power, in connection with a reorganization, to tell carriers who shall or shall not be laid off as a result of the merger. He stated further that the Commission's power and responsibility are limited to specifying protection of those who are laid off, the choice of those laid off being left to the managerial discretion of the carriers as limited by their collective bargaining agreements. The attorney stated, moreover, that the Commission merely identifies positions which would be affected and does not undertake to state what individuals would be affected.

The attorney for the Louisville and Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company stated that, in the merger agreement between the railroads, it is expressly provided that the Louisville and Nashville will assume any and all obligations and contracts of the Nashville, Chattanooga & St. Louis Railway Company, *including its negotiated union bargaining agreements.*

16. A temporary restraining order was issued in this cause on April 8, 1957, by John D. Martin, United States Circuit Judge, sitting by designation during the present illness of William E. Miller, Judge of the United States District Court for the Middle District of Tennessee; and this cause was set for final hearing before a three-judge court on May 7, 1957. The Chief Judge of the United States Court of Appeals, Sixth Circuit, designated Leslie R. Darr, United States District Judge for the Eastern District of Tennessee, and Roy M. Shelbourne, United States District Judge for the Western District of Kentucky, to sit as two members of the three-judge court, with United States Circuit Judge Martin completing the co[illegible] The designated three-judge court assembled and heard elaborate oral arguments at morning and afternoon sessions on May 7, 1957, following which the case was duly submitted.

CONCLUSIONS OF LAW

1. Section 1336 of Title 28, United States Code, confers on district courts the jurisdiction to enjoin, set aside and annul orders of the Interstate Commerce Commission pursuant to the procedure outlined in Section 2284. The plaintiff and the intervening plaintiffs have standing to maintain this action. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 267-269; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439.

2. Section 5(2) of the Interstate Commerce Act is constitutional. *United States* v. *Lowden*, 308 U. S. 225. The development and maintenance of an economical and efficient railroad system is a matter of primary national concern and legislation must be read with this purpose in mind. *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118, 124, 125. Compare *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 590.

3. By Section 5(2) of the Interstate Commerce Act, the Interstate Commerce Commission is empowered to author-

ize the merger of two or more railroads without regard to the provisions of the laws of any State, except that State law, if any, may govern the size of the stockholder vote required for approval of a merger.

3. The order of the Commission herein had for its purpose to authorize the merger of The Nashville, Chattanooga & St. Louis Railway into Louisville and Nashville Railroad Company, State law notwithstanding, except to the extent, if any, that State law governs the size of the stockholder vote required for approval of the merger.

5. The findings of the Commission are full and complete and are supported by substantial evidence. They constitute sufficient basis for the order of the Commission herein.

6. An order of the Interstate Commerce Commission is entitled to great respect, representing as it does the opinion of a body of experts upon matters within the range of their special knowledge and experience. *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 317; *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488; *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 512, 513; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547, 548; *Illinois Central R. R.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.

7. The plaintiff and the intervening plaintiffs object that the Commission committed numerous procedural errors. These objections have been considered by the court and have been found by it to be without merit. None of them is within the rule of prejudicial error, which is the criterion established by Section 10(e) of the Administrative Procedure Act, Title 5, United States Code, section 1009(e). The more important of these alleged errors are set forth below, this court holding in each instance that the action of the Commission did not constitute prejudicial error:

(a) The City of Nashville urged that the Commission should require the applicant railroads to produce certain preliminary reports concerning the merger which were made by a freight traffic manager of the Louisville and Nashville Railroad Company. The Commission stated that, although these reports were not produced by the applicants, "extensive testimony with respect thereto was presented by interveners in opposition through former vice-president in charge of traffic for the Tennessee Company."

(b) The City complains that the Commission refused to require applicants to supply certain employment figures. The record herein shows that the City wanted to use these figures to establish that the Louisville and Nashville Railroad's Accounting Department is overstaffed. Although the requested figures were not produced, the head of the Accounting Department of that railroad was presented as a witness by the railroad and the witness was ready to testify as to whether or not his department is overstaffed.

(c) The City requested that the applicants provide information as to the number of tons delivered by the Louisville and Nashville to the Nashville, Chattanooga & St. Louis Railway at Nashville for each of the years 1951 through 1954. The applicants agreed to supply such figures for 1953 and 1954. The Interstate Commerce Commission did not require that the figures for 1951 and 1952 be produced.

(d) The employee group complains that the Commission erred procedurally in not finding that the adverse effect of the merger on the employees would be "permanent"; in not considering its exception that the merger would produce "poorer" service; and in not considering its contention that diesel locomotive repair costs are higher on the Louisville and Nashville than on the Nashville, Chattanooga & St. Louis. The Commission was not required to make a specific finding on the first point; and the record

shows that it considered the contentions of the employee group on the other two points and rejected them.

8. From this record, we find no showing that there has been any violation of applicable anti-trust laws of the United States. For controlling principles, see *McLean Trucking Co.* v. *United States*, 321 U. S. 67; *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

9. The plaintiff and the intervening plaintiffs complain of the failure of the railroads, in the proceeding before the Commission, to join as an applicant the Mertcantile-Safe Deposit & Trust Company, shown by the application to be the principal stockholder of The Atlantic Coast Line Company. Neither the plaintiff nor any intervening plaintiff has shown wherein such failure adversely affects any of its legal interests. The court held that the failure to join the Mercantile-Safe Deposit & Trust Company was not a jurisdictional defect and does not affect the validity of the Commission's order herein; and that such failure, not being a jurisdictional defect and not having been raised in the proceeding before the Commission, cannot be raised now for the first time before this court.

In *Alleghany Corp.* v. *Breswick & Co.*, U. S. , decided April 22, 1957, it was held that "the failure to join two stockholders alleged to control Alleghany does not oust the Commission of jurisdiction."

In *United States* v. *Tucker Truck Lines*, 344 U. S. 33, 37, the Supreme Court said: "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

10. Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could

justify an order annulling, vacating or setting aside the order of the Commission.

11. The statute—49 U. S. C., Section 5(2)(f)—provides: "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected."

The approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of the Nashville, Chattanooga & St. Louis Railway Company shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in finding of fact Number 15.

12. An appropriate judgment in compliance with the conclusions herein expressed will be drawn and entered.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
United States District Judge

ROY M. SHELBOURNE
United States District Judge

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court
Middle District of Tennessee
By ROY CARMAN, D. C.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order

This cause came on for a final hearing on the complaint of the City of Nashville and the intervening complaints of the State of Tennessee, the Tennessee Public Service Commission, Davidson County, Tennessee, the NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representative of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, praying for a decree annulling, vacating and setting aside the report and order of the Interstate Commerce Commission dated March 1, 1957 [in a proceeding before the Commission entitled "Louisville and Nashville Railroad Company et al—Merger, etc., Finance Docket No. 18845"], before a three-judge court duly constituted pursuant to Sections 1336, 2284, and 2321, et seq. of Title 28, United States Code, composed of the Honorable John D. Martin, Judge of the United States Court of Appeals for the Sixth Circuit; the Honorable Leslie R. Darr, United States District Judge for the Eastern District of Tennessee; and the Honorable Roy M. Shelbourne, United States District Judge for the Western District of Kentucky;

And the cause having been heard before such three-judge court on May 7, 1957, and the record in the cause having been duly considered; for the reasons stated in the Findings of Fact and Conclusions of Law filed in this cause on May 24, 1957, and hereby made a part of the record in the cause;

IT IS ORDERED, ADJUDGED AND DECREED, That the complaint of the City of Nashville and the intervening complaints of the State of Tennessee, the Tennessee Public Service Commission, Davidson County, Tennessee, the NC&StL Railway Employees Job Protection Association, and Robert L. Bryson, Luther Thomas Lambert and Vernon H. Hedgepath, individually and as representatives of a class composed of 839 employees of The Nashville, Chattanooga & St. Louis Railway, be, and the same are hereby, dismissed; that the temporary restraining order heretofore granted on April 8, 1957, be, and the same is, hereby terminated and dissolved; and that the defendants and the Louisville and Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway are hereby awarded their costs herein;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the approval by this court of the order of the Interstate Commerce Commission of March 1, 1957, approving the merger upon the conditions therein stated, is based upon the express condition that the rights of the employees of The Nashville, Chattanooga & St. Louis Railway shall be protected equally with those of employees of the Louisville and Nashville Railroad Company as relates to seniority and to other conditions of employment in accordance with the express understanding as stated at the hearing by the attorney for the Interstate Commerce Commission and by attorneys for the two railroad carriers involved herein, disclosed in Finding of Fact No. 15.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
ROY M. SHELBOURNE
United States District Judges

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court
Middle District of Tennessee
By ROY CARMAN, D. C.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 2354—Civil

CITY OF NASHVILLE, TENNESSEE, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order—Bond

Pursuant to Rule 62(c), Federal Rules of Civil Procedure, and Rule 36(2) of the United States Supreme Court; and upon consideration of the briefs of counsel which indicate that an appeal is contemplated in the above-styled cause;

It is ORDERED, ADJUDGED AND DECREED, That, in event of appeal, the plaintiffs shall furnish bond in the amount of ONE HUNDRED THOUSAND DOLLARS ($100,000).

It is so ordered.

JOHN D. MARTIN
United States Circuit Judge

LESLIE R. DARR
United States District Judge

ROY M. SHERBOURNE
United States District Judge

Attest: A True Copy
L. B. ORMES, *Clerk*,
U. S. District Court,
Middle District of Tennessee
By ROY CARMAN, D. C.

APPENDIX B

Title 5, U. S. Code:

§ 1005. Ancillary matters.

Except as otherwise provided in this chapter—

• • • • • • •

(c) Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought . . . June 11, 1946, c. 324, § 6, 60 Stat. 240.

§ 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • • • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. June 11, 1946, c. 324, § 7, 60 Stat. 241.

§ 1007. Initial decisions; conclusiveness; review by agency; submission by parties; contents of decisions; record.

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

* * * * * * *

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. June 11, 1946, c. 324, § 8, 60 Stat. 242.

* * * * * * *

§ 1009. Judicial review of agency action.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . . . .

(d) Relief pending review.

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limi-

tations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

Title 15, U. S. Code:

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: . . .

Title 49, U. S. Code:

National Transportation Policy.

Act Sept. 18, 1940, ch. 722, title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act, chapters 1, 8, 12 and 13 of this title, by inserting before part I thereof (chapter 1 of this title) the following provision entitled 'National Transportation Policy:'

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12 and 13 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic

conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12 and 13 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * * * *

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings.

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this chapter, it shall be unlawful for any common carrier subject to this chapter, chapter 8 of this title, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: Provided, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will

not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: Provided further, That any contract, agreement, or combination to which any common carrier by water subject to chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

Unification, Mergers, and Acquisitions of Control.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any par thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

* * * *

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Non-Carrier Deemed Carrier Upon Acquiring Control.

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to

acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this chapter, sections 304 (a) (1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

Control Effected by Other Than Prescribed Methods.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amend-

atory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

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Plenary Nature of Authority Under Section.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof, called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction, without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the

creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—

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(2) Orders of Commission.

Except as otherwise provided in this chapter, all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

Tennessee Code:

Section 65-901. Power to consolidate.—Every railroad corporation existing in this state, and having authority to operate and maintain a railroad in this state, shall have power to consolidate with any other railroad corporation whose road shall connect with or intersect the road of such existing corporation, or any branch thereof. [Acts 1871, ch. 69, § 1; 1875, ch. 51, § 1; 1877, ch. 72, § 2; Shan., § 1522; Code 1932, § 2597.]

Section 65-902. Agreement in writing.—The agreement of consolidation shall be in writing, and shall set forth the corporate name agreed upon, and the terms and conditions of the consolidation. [Acts 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1523; Code 1932, § 2598.]

Section 65-903. Approval of stockholders.—The consolidation shall not have effect until the terms and conditions of the agreement shall have been approved by a majority of the stockholders of each of the consolidating companies, at a regular annual meeting. [Acts 1867-1868, ch. 72, § 1; 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1524; mod. Code 1932, § 2599.]

Section 65-904. Agreement—Evidence of stockholders' approval—Recorded in secretary of state's office.—The agreement, together with the evidence of the stockholders' approval, shall be filed and recorded in the office of the secretary of state. [Acts 1871, ch. 69, § 1; 1877, ch. 72, § 2; Shan., § 1525; Code 1932, § 2600.]

Section 65-905. Rights of creditors.—The rights of creditors of the consolidating companies shall in no wise be affected or impaired by such consolidation. [Acts 1871, ch. 69, § 1; 1877, ch. 12, § 4; 1877, ch. 72, § 2; Shan., § 1526; Code 1932, § 2601.]

Section 65-906. Consolidation of two or more corporations—Rights and liabilities of new corporation.—The corporation, formed by the consolidation of two (2) or more railroad corporations, shall have, possess, and exercise all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, not inconsisteht with the provisions of this chapter, conferred and imposed by the laws of this state upon such companies so consolidating, or either of them. [Acts 1877, ch. 72, § 3; Shan., § 1527; Code 1932, § 2602.]

Section 65-907. Powers of consolidated company.—It shall have power:

(1) To fix the number of its directors and the time of their election.

(2) To fix the number, names, and duties of its officers.

(3) To pass by-laws for the government of the company, and the management of its affairs.

(4) To create and divide its capital stock into two (2) or more classes, including common and preferred stock, any of which may be stock without par value and to issue the same, all as provided by §§ 48-202—48-204, pertaining to ordinary domestic corporations, which sections are declared to extend to corporations formed by the consolidation of two (2) or more railroad corporations; and any such corporation, heretofore so formed under the laws of this state, may avail itself of the powers and privileges hereby conferred by amendment or amendments to the charter of incorporation of such corporation, in the manner and by the means as now provided by law, or to the agreement of consolidation, setting forth the maximum number of shares of stock with nominal or par value and the maximum number of shares without nominal or par value that the corporation is authorized to have outstanding at any time, the classes, with the distinguishing characteristics of each, if any, into which the same are divided, and the nominal or par value of shares of stock other than shares which it is stated are to have no nominal or par value.

(5) To issue bonds and dispose of same in such form, and denomination, and bearing such interest, as the board of directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company, and of the companies from which it was formed.

(6) And to do all other acts and things which the said companies so consolidating, or either of them, might have done previous to such consolidation. [Acts 1877, ch. 72, § 3; Shan., § 1528; Code 1932, § 2603; Acts 1937, ch. 170, § 1; C. Supp. 1950, § 2603.]

Section 65-908. Privileges and exemption from taxation not transferred.—No franchise, right, power, immunity, or exemption not granted at the time of consolidation by the laws of this state to the railway companies which may form part of such consolidated company shall be given to, transferred to, or conferred upon any such consolidated company, or company or person operating such consolidation of railroads as provided for in this chapter or in any other law of this state; and no exemption from taxation of railroad property and franchises, and capital stock therein, contained in railway charters or other railway laws of this state, shall be transferred to, or conferred upon such consolidated company or the property and franchises and capital stock therein of such consolidation of railroads, or of the property appertaining thereto and used in the operation thereof. [Acts 1877, ch. 72, § 3; Shan., § 1529; Code 1932, § 2604.]

APPENDIX C

85TH CONGRESS, 1ST SESSION

H. R. 2142

IN THE HOUSE OF REPRESENTATIVES

JANUARY 7, 1957

MR. CELLER introduced the following bill; which as referred to the Committee on the Judiciary

A BILL

To amend the Sherman Act to declare the primacy of free enterprise, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 2, 1890 (ch. 647, 26 Stat. 209) Fifty-first Congress, first session (15 U. S. C., sec. 1 and the following), as amended, is further amended by inserting immediately before section 1 thereof the following:

"DECLARATION OF POLICY

"It is the policy of the United States that to the maximum extent practicable the principles of free private enterprise embodied in the antitrust laws shall be maintained. All officials, agencies, boards, and commissions authorized by Congress to regulate business and industry shall discharge their statutory responsibilities in a manner to give the maximum effect to this policy.

"No official, agency, board, or commission authorized under any provision of law to approve arrangements involving exemption from the antitrust laws shall grant approval of such exemption unless the official, agency, board, or commission finds that it is impracticable to discharge statutory responsibilities in a manner consistent with the antitrust laws.

"Where Congress has authorized any official, agency, board, or commission to restrict entry into an industry such authority shall be exercised in a manner to give the maximum effect practicable to the objectives of the antitrust laws.

"Unless any provision of law expressly provides otherwise, no proceeding instituted by the United States in the courts of the United States charging violation of the antitrust laws shall be barred or stayed for the reason that any official, agency, board, or commission has jurisdiction or is exercising jurisdiction over some or all of the activities included in the alleged antitrust violation."

Excerpts From Representative Celler's Press Release of January 7, 1957

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II. The second bill, the Primacy of Free Enterprise Bill, amends the Sherman Act by having Congress declare that it is the policy of the United States to maintain to the maximum extent practicable the American system of free competitive enterprise embodied in the antitrust laws. Its purpose is to establish a guide for administrative agencies, regulatory bodies and the courts in the exercise of their powers over business and arrangements involving exemptions from the antitrust laws. It creates a presumption in favor of free enterprise which will assure that our antitrust policy favoring competition is not subordinated unless this is found necessary to attain other objectives established by Congress. The bill makes it clear that Congress, in authorizing administrative bodies to regulate business and industry, intended such regulation to supplement and not to supersede our system of free competitive enterprise.

Rulings by administrative bodies and judicial decisions have unduly expended authorized exemptions from the

antitrust laws. Regulatory bodies and the courts have vacillated in the weight required to be afforded to antitrust objectives in determining the public interest. This bill establishes a guide so that there will be greater consistency in administrative and judicial action in this area. This bill is a recognition that it is time for Congress to reassert positively its belief that while it recognizes that competition alone will not always protect the public interest adequately, departures from antitrust norms should be kept to a minimum and that competition shall be preserved and encouraged in the regulated industries except where it appears that over-riding statutory objectives cannot be achieved under competitive conditions.

Under the doctrine of primary jurisdiction, the courts of the United States have declined to give relief against allegedly unlawful restraints of trade if it appeared that administrative agencies have been vested with authority to approve some or all of the activities challenged as illegal. The courts have withheld their powers in these cases out of deference to superior technical experience, commonly referred to as "expertise" of the regulatory agencies. One result of the application of this doctrine of primary jurisdiction, however, has been that the Attorney General has been ousted from his prescribed duty to enforce the antitrust laws and, in regulated industries, business firms involved in activities illegal under the antitrust laws have been granted a greater immunity than intended by Congress.

As this doctrine of primary jurisdiction has been construed by the courts, the Attorney General appearing for the United States in its sovereign capacity to prevent and restrain violations of its criminal laws has been relegated to the position of a supplicant before regulatory bodies. Moreover, under existing judicial decisions, the Attorney General must go to the administrative agency even if that body has never approved the activities being attacked by

the United States and no exemption from the antitrust laws has been obtained.

This bill would make it clear to the courts that it is the intention of Congress that suits brought by the United States to prevent or to punish activities declared to be illegal by the antitrust laws should not be stayed or barred on the ground that any other agency of the Government also has jurisdiction over the activities challenged by the Attorney General.